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NO. 82-211

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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TERRY L. BORTON,
PETITIONER,
VS.
UNITED PARCEL SERVICE, INC.,
RESPONDENT.

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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# PETITIONER'S REPLY TO RESPONDENT UNITED PARCEL SERVICE, INC.'S BRIEF IN OPPOSITION

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I

## INTRODUCTION

Respondent, United Parcel Service, Inc. (hereinafter UPS), in its brief in opposition to Terry L. Borton's (hereinafter Borton) petition for writ of certiorari, says that even if the jury was legally correct in finding that Borton's Union breached its duty of fair representation to him and UPS breached its labor agreement in discharging Borton, this Court should nevertheless ignore the error committed by the Seventh Circuit Court of Appeals in taking Borton's favorable jury verdict away from him because the Seventh Circuit's use of an erroneous standard in denying Borton a right to trial by jury and assuming jurisdiction when it had none are simply not the kind of problems

worthy of this Court's attention.

Brief in Opposition, pp. 7, 8.

This case is important for two reasons: first, the Seventh Circuit's refusal to follow this Court's breach of duty standard has challenged the very integrity of this Court's decisions as binding precedent and if left unchecked, other litigants will continue to suffer the same fate as Borton; and, secondly, an authoritative decision is needed to clarify whether a motion for directed verdict taken under advisement survives the entry of judgment on a jury verdict, and, if so, whether the reserved motion for directed verdict tolls the 30-day period for filing a notice of appeal.

## II

## THE INTEGRITY OF THIS COURT'S BREACH OF DUTY CASES IS BEING CHALLENGED

### A. THE SEVENTH CIRCUIT'S REFUSAL TO FOLLOW THIS COURT'S PRECEDENT HAS DENIED BORTON AND OTHER LITIGANTS IN THE SEVENTH CIRCUIT A FAIR FORUM FOR HEARING §301 ACTIONS (29 U.S.C. §185).

Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903 (1967), and Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 96 S.Ct. 1048 (1976), hold that a union breaches its duty of fair representation if its conduct towards a union member is arbitrary, discriminatory, in bad faith, or if a grievance is handled by it in a perfunctory fashion.

In this case, the Seventh Circuit Court of Appeals applied its own nonconforming breach of duty test and held that Borton could only prove breach of duty by adducing " . . . substantial

evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives. . . . "

> Borton v. United Parcel Service, Inc., No. 81-1536 (7th Cir. Mar. 9, 1982); (App. p. A5).

Borton proved by a preponderance of the evidence that his Union processed his grievance in a perfunctory fashion, and the jury verdict in his favor should have been upheld.

In addition to the Seventh Circuit, the Tenth Circuit Court of Appeals also requires proof of fraud and deceit to establish a union's breach of duty of fair representation.

> Woods v. North American Rockwell Corp., 480 F.2d 644, 648 (10th Cir. 1973).

All other Circuit Courts of Appeal follow this Court's breach of duty

standard.

> Petition for Writ of Certiorari, pp. 23, 24.

This case is, therefore, not only important to Borton, but it also should be reviewed so that the same breach of duty standard is applied in all Circuit Courts of Appeal.

**B. BORTON AND OTHER LITIGANTS IN THE SEVENTH CIRCUIT HAVE BEEN AND ARE BEING DENIED A FAIR OPPORTUNITY TO ADDRESS THEIR §301 CLAIMS.**

UPS claims that Borton is not entitled to a redetermination of his discharge unless the Union's conduct was arbitrary, discriminatory or in bad faith.

> Brief in Opposition, pp. 11-12.

UPS fails to mention that breach of duty is also shown by a union's perfunctory handling of a grievance.

Vaca v. Sipes, supra, at 916, 917; Hines v. Anchor Motor Freight, Inc., supra, at 1058.

The conduct of Borton's Union in perfunctorily handling his grievance sank below even the minimum standards required of unions in investigating and processing an employee's grievance and, as a result, Borton was denied a fair grievance hearing. By failing even to consider whether the facts and favorable inferences from those facts established a jury question as to whether Borton's Union perfunctorily handled his grievance, the Seventh Circuit denied Borton any kind of forum to fairly address his wrongful discharge, Hines v. Anchor Motor Freight, Inc., supra, at 1060, and violated his seventh amendment right to trial by jury.

Atlantic & Gulf
Stevedores, Inc. v.
Ellerman Lines, Ltd.
and the City Line,
Ltd., 369 U.S. 355,
82 S.Ct. 780 (1962).[1]

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1 Because the jury found in favor of Borton, he is entitled to all favorable inferences from the facts presented at trial, and the Court of Appeals was without authority to substitute its own version of the facts. UPS acknowledges that the question of breach of duty is "essentially a factual question, not a legal one."

Brief in Opposition, p. 7.

UPS falsely claims that no new evidence was presented at trial which was not introduced at the grievance hearing.

Brief in Opposition, p. 10.

At trial, Borton produced numerous witnesses who did not testify at the grievance hearing. Some of these trial witnesses testified that the cause of the accident was undetermined (UPS accident investigator Rutz (T. Vol. I, pp. 4, 6, 9, 11, 12, 15, 16, 17, 20, 21; Vol.

This same result has occurred in the Tenth Circuit and, since its decision in Hoffman v. Lonza, Inc., 658 F.2d 519 (7th Cir. 1981), it has occurred routinely in the Seventh Circuit.

See: Rupe v. Spector Freight Systems, Inc., 679 F.2d 685 (7th Cir. 1982);

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II, pp. 470-475; Vol. IV, p. 496)); that Borton had tried to avoid the accident (Indiana State Police Trooper Carter (T. Vol. III, pp. 408-409)); that it is UPS' policy to give like punishment for like infractions (UPS employees Pandoli and Giovanetti, T. Vol. I, pp. 26, 29-36; Vol. II, pp. 106-117; Vol. III, pp. 315-324)); that if the Grievance Panel had known that two other UPS drivers were not discharged for accidents similar to Borton's, it could have made a difference in the type of penalty given to Borton! (UPS employee Giovanette, who was also a member of Borton's Grievance Panel, (T. Vol. III, pp. 315-324).

Cote v. Eagle Stores, Inc., 110 LRRM 2775 (7th Cir. June, 1982).

III

THE SEVENTH CIRCUIT COURT OF APPEALS LACKED JURISDICTION TO HEAR THIS APPEAL BECAUSE THE NOTICE OF APPEAL WAS FILED 102 DAYS AFTER ENTRY OF JUDGMENT ON THE JURY VERDICT, AND NO POST-TRIAL MOTION TOLLING THE TIME WITHIN WHICH TO FILE THE NOTICE OF APPEAL HAD BEEN FILED

At the close of all the evidence, UPS moved for a directed verdict (T. Vol. V, p. 3). The District Court reserved ruling on the motion and submitted the case to the jury.

After the jury returned its verdict in favor of Borton, the District Court entered judgment thereon. The District Court never ruled on UPS' motion for directed verdict. UPS did not file any post-trial motions tolling the notice of appeal time limitation pursuant to

F.R.Civ.P. 50(b), 52(b), 59(b) or 59(e). (R. Vol. I, docket sheet).

F.R.Civ.P. 50(b) explicitly states that a reserved motion for directed verdict does not survive the submission of the case to a jury and entry of a judgment thereon unless, within 10 days after entry of judgment, the motion for directed verdict is renewed. UPS never did this, and none of the authorities cited by UPS (Brief in Opposition, pp. 13-15) support its position that the reserved motion for directed verdict was the functional equivalent of a F.R.Civ.P. 50(b) motion.

## IV

## CONCLUSION

This case deserves consideration by this Court. In addition to Borton's case, the Seventh Circuit Court of Appeals

has misapplied this Court's breach of duty standard in three other §301 cases.

In Borton's case the Seventh Circuit Court of Appeals not only denied him the fruits of his jury verdict by use of its ill-conceived breach of duty standard, but it did so when it was without jurisdiction to act at all.

For all of the foregoing reasons, this Court should grant Borton's petition for writ of certiorari and enter an appropriate order.

Respectfully submitted,

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